EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 061086

CASE NBR 85-1-01321 CSH
SHORT TITLE Ramirez, Rudy J. DOCKETED: Nov 9 1985
VERSUS California

Date	Proceedings and Orders
Nov 9 1985	Petition for writ of certiorari filed.
Mar 5 1986	DISTRIBUTED. March 21, 1986
Mar 19 1986	Response requested.
Apr 14 1986	Brief of respondent California in opposition filed.
Apr 16 1986	REDISTRIBUTED. May 2, 1986
May 5 1986	REDISTRIBUTED. May 15, 1986
May 16 1986	REDISTRIBUTED. May 22, 1986
May 27 1986	Petition DENIED. Dissenting opinion by Justice White with whom Justice Brennan and Justice Powell join. (Detached opinion.)

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85-1321

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

RUDY J. RAMIREZ,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MICHAEL SATRIS
Post Office Box 852
San Anselmo, CA 94960
Telephone: (415) 258-9304

ATTORNEY FOR PETITIONER

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Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

_____

Petitioner RUDY J. RAMIREZ, by his counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court

of California, entered in this proceeding on September 26, 1985.

QUESTION PRESENTED

Whether California's new statutory scheme for forfeiture of sentence credits, which scheme enlarges the misconduct for which credit may be forfeited and increases the amount of credit which may be so forfeited, is ex post facto when applied to prisoners who committed their crimes before the effective date of the new scheme.

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OPINIONS BELOW

The opinion of the California Supreme Court denying the petition for writ of habeas corpus may be found at 39 Cal.3d 981 (1985); a copy of it is also appended hereto as Exhibit "A."

The lower court orders in this case, including the minute orders denying the petitions by the Superior Court and the Court of Appeal, and the Court of Appeal opinion following remand back to it by the state high court, are appended hereto as Exhibit "B."

Copies of the remittitur issued by the California Supreme Court and its order denying rehearing in the case are appended hereto as Exhibit "C."

JURISDICTION

The judgment of the California Supreme Court was entered on September 26, 1985, and rehearing was denied on

October 25, 1985. This petition for certiorari is timely filed within sixty days of the latter date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1257(3).

CONSTITUTIONAL, STATUTORY, AND ADMINISTRATIVE PROVISIONS INVOLVED

Article 1, section 10, clause 1 of the United States Constitution, the provisions of former California Penal Code sections 2931-32 and code sections 2931-35 effective January 1, 1983, and section 3315 of Title 15 of the California Administrative Code are appended hereto as Exhibit "D."

STATEMENT OF THE CASE

California Penal Code sections 2930--2935, effective January 1, 1983, substantially revised the scheme under which the state's prisoners can earn and forfeit credits against their prison sentence.

Prior to January 1, 1983, a state prisoner could reduce his term of confinement by up to one-third by earning various credits against that term. The credits earned were subject to forfeiture only for narrowly proscribed misbehavior, and at a maximum rate of 15, 30, or 45 days, depending on the seriousness of the misconduct. A limit was placed on the amount of credits which could be lost during any eight-month period.

The new law effective January 1, 1983, allows an opportunity for prisoners to reduce their term by as much as one

half. Prisoners whose crimes were committed before January 1, 1983, may opt into the new credit granting system by waiving their rights to receive credits under the old law. Prisoners committed on or after January 1, 1985, are automatically within the new system for obtaining credits.

The forfeiture provisions of the new law apply automatically to all prisoners, regardless of the date on which their commitment occurred, so that the old forfeiture system ceased to exist. The new credit loss provisions are more onerous in several ways than the ones they replace. First, the new law subjects to credit forfeiture a much broader range of misconduct than did the old law. Second, the new law increased the amount of time which could be forfeited for misconduct so that, for

example, up to 30 days can be taken for the least serious misconduct while up to 180 days can be taken for any misconduct amounting to a felony. Finally, the new law eliminated the old law's limit on credits subject to forfeiture during any eight-month period. A more elaborate description of the pertinent statutes is contained in the state high court opinion under review (Exhibit A).

Petitioner was imprisoned for a crime committed before the effective date of the new law; he did not opt into the credit-granting provisions of the new law. He was found guilty of misconduct occurring after the new law had become effective. The new law's credit forfeiture provisions were applied to him, so that he forfeited more credit for the specified misbehavior than he would have been liable for under the old law.

As the California Supreme Court described the procedural history of the case: "In May 1983 petitioner filed a petition for habeas corpus in the superior court challenging the application of the new system to him. That petition was denied on the ground that petitioner had not exhausted his administrative remedies. The Court of Appeal affirmed. We remanded this case to the Court of Appeal with instructions to consider the constitutionality of the 1982 amendments in light of Weaver v. Graham (1979) 450 U.S. 24. The Court of Appeal ... held that the 1982 amendments may be applied to petitioner without violation of the state or federal ex post facto clauses. We granted the petition for hearing to resolve the conflict between the Court of Appeal decision in this case and the decision in In re Paez

(1983) 148 Cal.App.3d 919." (Exhibit A, p. 4.) The California Supreme Court similarly denied the petition for writ, two justices dissenting.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE CONTROLLING DECISIONS OF THIS COURT.

In Weaver v. Graham (1979) 450 U.S. 24, this Court set forth the required analysis in determining whether a change in the length of a prisoner's sentence occasioned by an alteration of the state's time credit laws amounts to ex post facto punishment. As the opinion under review here observed, Weaver explained "that an ex post facto law 'must be retrospective ... and it must disadvantage the offender ....'" (Exhibit A [Majority opinion], p.5, citing Weaver, 450 U.S. at p. 29.)

Finding the new amendments at issue here disadvantageous, the court below went on to "conclude that the 1982 amendments are not retrospective and therefore do not violate the ex post facto clauses." (Exhibit A [Majority opinion] p. 9.) Such a conclusion, however, may not be squared with Weaver.

The question presented in Weaver was whether a state's statute which decreased the opportunity to earn sentence credits was ex post facto when applied to a prisoner whose crime was committed before the statute's enactment. The instant case is the flip side of Weaver: instead of a state statute decreasing the opportunity to earn credits, the case at bar presents a state statute increasing the opportunity to lose credits. In Weaver this Court rejected the State's claim, like the one the here accepted in

the court below, that the statute was not retrospective because it applied only to events after its effective date; this Court explained as follows.

> This argument fails to acknowledge that it is the effect, not the form, of the law that determines whether it is ex post facto. The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast as asking whether [the state statute] applies to prisoners convicted for acts committed before the provision's effective date."

Weaver v. Graham, supra, 450 U.S. at 31. As the dissenting opinion of the court below noted, this Court's holding as set forth above is "squarely on point and controlling." (Exhibit A [Dissenting opinion] p. 1.) The critical question is whether the statute applies to prisoners convicted for acts committed before the provision's date, and the obvious answer

here is that it does. Thus, the fact that "the increased sanctions are imposed solely because of petitioner's prison misconduct occurring after the 1982 amendments became effective" (Ex. A [majority opinion] p. 9) does not demonstrate otherwise, since it can be said just as easily that the state statute in Weaver applied only to conduct -- albeit good conduct -- after the statute's enactment.

The court below distinguished the case at bar from Weaver by the central fact that the onerous effect of the legislative change at issue in Weaver applied to passive or "good" prisoners, while in the instant case the onerous effect is only on "bad" prisoners. As the court below expressed it: "Unlike Weaver, petitioner's effective sentence is not altered by the 1982 amendments

unless petitioner, by his own action, chooses to alter his sentence." (Ex.A [Majority opinion] p. 10.) But the point overlooked below is that the amendments significantly increased the prisoner's exposure to extension of his prison term. Just like Weaver found that the reduced possibility of sentence credit effectively increased the quantum of punishment since sentence credits are one determinant of the length of the prison term, here the increased potential for credit loss effectively increased the quantum of punishment since such losses similarly are one determinant in the length of the prison term. Petitioner's initial sentence in effect had attached to it a certain set of conditions for determining its length, and to the extent the amendments changed those conditions to his detriment -- as undeniably they

did -- petitioner suffered a prejudicial change in punishment. As was stated in In re Paez (1983) 149 Cal.App.3d 919,922, 196 Cal.Rptr. 401, a California Court of Appeal decision which found the new legislation ex post facto but now has been disapproved by the court below in the opinion here at issue:

> The Attorney General argues that the essential difference between Weaver and the instant case is the difference between reducing the amount of credits that can be earned and increasing the amount of forfeiture upon misconduct. In the latter situation, it is conduct after conviction which is being punished. In the former, regardless of conduct after conviction, punishment is effectively increased. This difference, while it exists, does not defeat the ex post facto argument. Even though forfeiture involves misconduct after conviction it also is a "legal consequence" which "attaches" to the crime for which the prisoner is incarcerated for it changes the amount of time the prisoner

must serve for that crime before being released.

This is why, as the dissent instructs (Ex.A at p.3), "focus should be on the petitioner's offense in this case," just as this Court's point of reference in Weaver for determining retroactivity was on the date of the commitment offense. As the dissent further explained (id. at 3-4):

> The state is not punishing petitioner for a new crime .... Instead, the state is increasing the punishment for an offense committed before the additional sanctions were enacted. As we stated previously, "[t]he tenor of Weaver seems unmistakable: prejudicial changes in punishment enacted after commission of a crime are suspect on ex post facto grounds." (In re Stanworth (1982) 33 Cal.3d 176, 181).

The opinion below also found that "[e]ven if we were to accept petitioner's argument that the 1982 amendments relate to his initial offense, we would still

hold that the ex post facto clauses are not violated [because] the 1982 amendments simply change one aspect of petitioner's life in prison" rather than change what Weaver called a "punitive condition outside the sentence." (Exhibit A [Majority opinion] p. 10.) While the majority observed that "[i]f any aspect of prison life is unconnected to a prisoner's original crime, it would seem to be the sanctions for his misconduct while in prison" (Ex. A, p. 9), that hardly is true when the sanction is an extension of the prisoner's sentence for that crime. Indeed, extension of the actual prison term is the quintessence of a punitive condition outside the sentence as this Court contemplated that phrase in Weaver; it certainly relates more closely to the punishment imposed for the crime than,

for example, a requirement of solitary confinement, which requirement this Court ruled ex post facto when applied to someone who committed his crime prior to enactment of the requirement. See In re Medley (1890) 134 U.S. 160. Again, the dissenting opinion points out the conflict with Weaver best: "The Supreme Court in Weaver found that a reduction in a gain-time provision changed the quantum of punishment. ([Weaver v. Graham , supra] at p. 33.) It is difficult to understand why increasing sanctions for prison misconduct would not also be regarded as a punitive condition." (Ex. A [Dissenting opinion] p. 4). The further criticism of the dissent in the court below is also right on point in this respect:

> [T]he majority fails to acknowledge that sanctions are also one determinant of petitioner's total prison term.

> Once this determinant is changed, petitioner's effective sentence is altered. That is what Weaver v. Graham is all about.

(Exhibit A [Dissenting opinion] p.2.

To the degree that the court below relied on the fact that the disadvantage suffered by petitioner due to the new amendments is not ex post facto because it was "his own action" which triggered their application, of which he had "fair warning" (see Ex. A [majority opinion] pp. 10 and 13), "[t]he incorrectness of the majority's line of analysis is demonstrated by the contrary and correct analysis of Greenfield v. Scafati (D.Mass. 1967) 277 F.Supp. 644, summarily affirmed (1968) 390 U.S. 713, cited with approval in Weaver." (Ex. A (Dissenting Opinion) p. 2.) The statute at issue there disadvantaged the convicted felon by providing, in the event of violation

of parole, for forfeiture of the opportunity to earn good-time in addition to the existing sanction of return to prison. As the dissent below noted:

> In that case, the petitioner acted in violation of his parole <u>after</u> the statute was amended. Accordingly, the amended statute would not have altered the petitioner's effective sentence unless petitioner, by his own actions, chose to alter his sentence by violating parole. The petitioner also had fair warning that if he committed certain parole violations, he would be subject to increased sanctions. Despite these factors, the court concluded that application of the amended statute to the petitioner was unconstitutional as an ex post facto law.

(Exhibit A [Dissenting opinion] pp. 2-3; emphasis in original.) Implicitly conceding that <u>Greenfield</u> logically controlled here, the majority distinguished it on the curious ground that it concerned persons on the street rather than behind prison walls. [Ex. A

(Majority opinion, p. 12.) Specifically, the majority was concerned about the practical effect on prison administration of a finding of ex post facto violation in this case: "From the standpoint of prison order, it is simply infeasible to run a prison in which some inmates are wholly or partially immune from punishment for conduct for which others receive serious penalties." (Ex. A [Majority opinion] p.11. The dissent properly characterized that concern as a "paper tiger." (Ex. A [Dissenting opinion] p. 4.) Besides the fact that prison officials could enforce a uniform disciplinary standard by resort to criminal prosecution, as suggested by the dissent, prisoners such as petitioner also remain subject to all the other disciplinary sanctions available to prison officials. (See 15 Cal.Adm.Code

section 3315 [Ex. D].) Petitioner and others like him would be no more "immune from punishment" for in-prison misconduct than was the petitioner in Greenfield immune from punishment for violation of parole.

In sum, the decision at issue here directly conflicts with both Greenfield and Weaver, decisions of this Court which should control disposition of this case. This Court should grant certiorari here in order to insure that the constitutional freedoms protected by such decisions are adhered to by the state courts.

II. The Decision Below Conflicts In Principle With the Decision Of a Court Of Appeals On the Point.

In considering a Louisiana statute which revoked previously earned good time credits when a prisoner violated his

parole, the Fifth Circuit Court of Appeals held that application of the statute to a prisoner originally sentenced before the adoption of the statute constituted an ex post facto violation even though the violation was committed after the effective date of the statute:

> The crucial issue here ... is not that petitioner had notice that he would forfeit his accrued good time if he violated parole, but that ... the forfeiture of good time is a sanction that extends the time remaining on petitioner's original sentence. The practical effect is a statutory increase in punishment for the first offense, enacted subsequent to the commission of the offense."

Beebe v. Phelps (5th Cir. 1981) 650 F.2d 774, 776. This Court thus should grant the petition here to resolve the conflict among the courts as to application of the ex post facto clause when the onerous effect of a change of the law is

triggered only by misconduct which occurs after the law's change.

There is no question that the lower courts require guidance on the ex post facto question in this context. For example, Warren v. United States Parole Commission (D.C. Cir. 1981) 659 F.2d 183, cert den. 445 U.S. 950 (1982), found that certain guidelines adopted for re-parole of violators were not ex post facto when enacted after commission of the defendant's commitment offense but before commission of the parole violation, since the defendant "was provided fair notice on which he could rely regarding the consequences of prohibited conduct while he was released on parole." Id. at 194. Now the case at bar follows which even more directly conflicts with Beebe. Just as the California Supreme Court granted hearing in this case to resolve the

conflict in that state's appellate courts on the issue, this Court should grant certiorari to resolve the conflict created by the decision here under review.

III. THE IMPORTANCE OF THE QUESTION PRESENTED MERITS THE ATTENTION OF THIS COURT.

By its consideration of Weaver, this Court already has implicitly acknowledged that the ex post facto implications of changes in good time laws raise an issue worthy of the attention of the Court. Indeed, as this Court noted therein, "So much importance did the [C]onvention attach to the ex post facto prohibition], that it is found twice in the Constitution." Weaver v. Graham, supra, 450 U.S. at 28, n.8, quoting Kring v. Missouri (1883) 107 U.S. 221, 227 [brackets in Weaver].

In this case, the change in the law is by a state with one of the largest prison populations in the country and applies to it across the board. Moreover, the credit forfeiture changes here at issue are only the tip of the iceberg. For example, a recent addition to California Penal Code section 3057 to permit extensions of the terms of parole violators who engage in misconduct during the service of those terms is also the subject of litigation in California. (Appended hereto as Exhibit E is a copy of the Court of Appeal opinion filed November 19, 1984, finding that law ex post facto when applied to violators whose commitment offenses occurred prior to the law's enactment, and the California Supreme Court order granting hearing in that case on February 14, 1985; In re Leday, Court of Appeal No.

AO27744 and Supreme Court No. 24345.) In addition, California has doubled the maximum amount of credits that may be forfeited even since enactment of the legislation here at issue, so that prisoners like petitioner will now be liable for loss of credits of up to one year for specified misconduct. (See California Department of Corrections Administrative Bulletin No. 85/2 describing the amendment to Penal Code section 2932 effective January 1, 1985, a copy of which bulletin is appended hereto as Exhibit F.)

Thus, in a time when punitive legislation is being enacted with more and more regularity in California, if not the rest of the nation, the need for this Court's protection of the fundamental right of the individual to freedom from

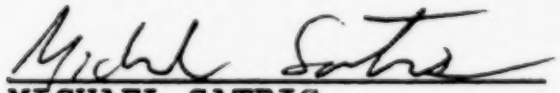
ex post facto punishment has never been greater.

CONCLUSION

For the reasons set forth above, the Court should grant the petition and issue the writ of certiorari requested.

DATED: November 4, 1985

Respectfully submitted,



MICHAEL SATRIS
Attorney for Petitioner

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re RUDY J. RAMIREZ

Crim. 23684

On Habeas Corpus.

/

The issue presented is whether a new statutory plan for awarding sentence reduction credits may be applied, without violation of the ex post facto clauses of the California 1/ or federal 2/ Constitutions, to prisoners who committed crimes before the effective date of the new scheme. We conclude that it may.

I. Statutory Provisions

Before 1983, former Penal Code

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1. Article I, section 9.

2. Article I, section 10.

3/ sections 2931 and 2932 governed the award of sentence reductions to prisoners. Under former section 2931, prisoners had their sentences reduced both by refraining from certain enumerated offenses and by participating in approved "work, educational, vocational, therapeutic or other prison activities." By refraining from enumerated offenses, prisoners received "good behavior credits" of three months for each eight months served. By participating in the approved activities prisoners received "participation credits" of one month for each eight served.

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3. All further references are to this code.

Both good behavior and participation credits were subject to forfeiture under former section 2931. By committing one of the proscribed acts, a prisoners lost 15, 30, or 45 days of good behavior credit depending upon the seriousness of the act. If a prisoner failed to participate in the approved programs, he lost 30 days of participation credit. Under former section 2932, not more than 90 days of good behavior credit nor more than 30 days of participation credit could be forfeited in any 8-month period.

On January 1, 1983, a new plan (hereafter the 1982 amendments) for awarding sentence reduction credits

became effective.4/ The new plan applies to prisoners who committed crimes after January 1, 1983, but all other prisoners may waive their right to be governed by the old system and elect the new system. In broad terms, the new method eliminates good behavior and participation credits but provides "worktime credits" of six months for each six-months served for "performance in work assignments and performance in elementary, high school, or vocationsl education programs."

Significantly, for our purposes, the 1982 amendments also change the old plan as applied to prisoners who do not elect to be governed by

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4. Statutes 1982, chapter 1234.

the new plan. First, a prisoner may lose accumulated good behavior credits for "any act...which...could be prosecuted...as a misdemeanor or a felony, or any act of misconduct described as a serious disciplinary infraction by the Department of Corrections." ([2931.) Under the old system only particular enumerated acts resulted in forfeiture. Second, the new provisions increase the credits subject to forfeiture for misconduct to 180 days for felonies, 90 days for misdemeanors, and 30 days for serious disciplinary infractions. (§2932.) Third, a "serious disciplinary infraction" committed during an

activity for which participation credits are awarded, shall be deemed a failure to participate, subjecting the prisoner to a loss of participation credits as well as good behavior credits. (Ibid.) The prior law did not provide for the forfeiture of participation credits in such a situation. Finally, the new plan eliminates the limit on credits subject to forfeiture during any eight-month period. (Ibid.) No provision of the 1982 amendments affects credits relating to time served before 1983.

II. Facts

Petitioner, Rudy J. Ramirez, is imprisoned for a crime committed before January 1, 1983. On that

date he was incarcerated at the California Men's Colony at San Luis Obispo, and he has not elected to be governed by the new system. In January 1983 he was charged with altering the paperwork relating to a television set, resulting in the loss under the new plan of 95 days of behavior credits. In an administrative appeal the loss was reduced to 48 days. Under the old plan, petitioner would have been subject to a maximum forfeiture of 15 days.

In May 1983 petitioner filed a petition for habeas corpus in the superior court challenging the application of the new system to him. That petition was denied on the ground that petitioner had not

exhausted his administrative remedies. The Court of Appeal affirmed. We remanded this case to the Court of Appeal with instructions to consider the constitutionality of the 1982 amendments in light of Weaver v. Graham (1981) 450 U.S. 24. The Court of Appeal, in a published opinion, held that the 1982 amendments may be applied to petitioner without violation of the state or federal ex post facto clauses. We granted the petition for hearing to resolve the conflict between the Court of Appeal decision in this case and the decision in In re Paez (1983) 148 Cal.App.3d 919.

III. Discussion

The Florida statute at issue in Weaver reduced the amount of good time credits prisoners could earn but did not disturb credits earned prior to its effective date. The Florida scheme did not contemplate additional credit for work assignments but did provide discretionary credits for "some outstanding deed" or particularly skillful or industrious performance of work assignments. The Supreme Court of the United States held the statute invalid as ex post facto. Justice Marshall, writing for the majority, observed that an ex post facto law "must be retrospective...and it must disadvantage the offender...." (Weaver. supra, 450 U.S. at p. 29.)

Florida contended that the statute was not retrospective because it affected only future credits and because the good time system was not an integral part of the prisoner's sentence. The Supreme Court concluded instead that the statute was retrospective because it changed the "legal consequences" of crimes committed before its effective date and was part of the prisoner's "punitive conditions" even though not technically part of his sentence. (Weaver, supra, 450 U.S. at pp. 31, 32.) The court found that the prisoner was disadvantaged because he earned less credit for the same conduct. The Supreme Court also rejected Florida's argument that

the new scheme was not disadvantageous because it provided the opportunity to earn more credits than under the old scheme on the grounds that to earn such credits the prisoner must perform in a superior fashion and that such awards were discretionary in any event. (Id., at p. 35.)

We addressed the question of ex post facto laws in a similar context in In re Stanworth (1982) 33 Cal.3d 176. There we found ex post facto the application of the Determinate Sentencing Act 5/ parole guidelines to prisoners sentenced under the earlier

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5. Section 1170 et seq.

Indeterminate Sentence Law.6/ In deciding whether the new system was disadvantageous to the prisoner, we noted, following Weaver, that the issue was not the actual application to the petitioner, "but whether the standards...have been altered to [the prisoner's] detriment." (Id., at p. 186, italics added.)

In Paez, the Court of Appeal held that the 1982 amendments, which are at issue here, are ex post facto laws. The Attorney General raised two contrary arguments. First, he argued that Weaver is distinguishable because the credits there were reduced regardless of

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6. Former section 1168, repealed effective January 1, 1977.

the prisoner's good conduct. Under the 1982 amendments the credits for good behavior remain the same; only subsequent misconduct results in the new sanctions. Second, he contended that because the credit forfeitures were punishments for improper prison conduct rather than additional sanctions for the original crimes, the new system was not retrospective. The Court of Appeal rejected both arguments holding, as to the first, that the credit system was a legal consequence of the original crime, even if the system's deleterious effect was only triggered by later events. (Paez, supra, 148 Cal.App.3d at p. 922.) The court likewise rejected the Attorney

General's second argument on the ground that the forfeiture of credits in no way precluded a criminal prosecution for the same action. Because the state did not charge the prisoner with a new crime, the forfeiture could not be punishment for that crime; rather it was an administrative sanction that must relate to the original crime. (Id., at p. 923.)

A. Disadvantageous

The first issue is whether the 1982 amendments are disadvantageous to petitioner. If we were unencumbered we would be tempted to find that any disadvantage stems from petitioner's own action and that the 1982 amendments are not disadvantageous on their face.

Weaver, however, held that a prisoner's control over the increased sanctions of the new plan is irrelevant to whether that plan is deemed disadvantageous. (Weaver, supra, 450 U.S. at p. 33.) In Stanworth, we analyzed the new system not by examining whether the prisoner had actually been disadvantaged but by determining whether the system itself had been altered to the prisoner's detriment. (Stanworth, supra, 33 Cal.3d at p. 186.)

Turning to the 1982 amendments, as we have stated, (1) the acts that may result in a forfeiture of good behavior credits have been expanded, (2) the amount of credits forfeitable for disciplinary

violations has been increased, (3) an act punishable by loss of good behavior credits may now sometimes result in a loss of participation credits as well, and (4) the limit on the credits forfeitable over an eight-month period has been deleted. All of these changes, of course, are disadvantageous to petitioner. Accordingly, we conclude that the 1982 amendments meet the first part of the Weaver test for finding a law ex post facto.

B. Retrospective

The second part of the Weaver test is whether the 1982 amendments are retrospective. For a law to be retrospective, "it must apply to events occurring before its

enactment." (Weaver, supra, 450 U.S. at p. 29.) A retrospective law violates the ex post facto clauses when it "substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.'" (Id. at p. 33, citing Dobbert v. Florida (1977) 432 U.S. 282.)

We conclude that the 1982 amendments are not retrospective and therefore do not violate the ex post facto clauses. Petitioner, citing Paez, contends that the 1982 amendments relate to the original offense, not to the infraction committed in prison. We disagree. It is true that the 1982 amendments apply to petitioner only because he

is a prisoner and that he is a prisoner only because of an act committed before the 1982 amendments. Nonetheless, the increased sanctions are imposed solely because of petitioner's prison misconduct occurring after the 1982 amendments became effective. In other words, the 1982 amendments apply only to events occurring <u>after</u> their enactment. If any aspect of prison life is unconnected to a prisoner's original crime, it would seem to be the sanctions for his misconduct while in prison. Accordingly, the 1982 amendments, which change the sanctions for that misconduct, do not relate to petitioner's original crime and are not retrospective

under Weaver.

The Weaver court held that the opportunity to earn good time credits was "one determinant of petitioner's [initial] prison term--and that his effective sentence is altererd once this determination is changed." (Weaver, supra, 450 U.S. at p. 32.) There is a critical difference between a diminution of the ordinarty rewards for satisfactory performance of a prison sentence--the issue in Weaver--and an increase in sanctions for future misbehavior in prison--which is at issue here. Here, petitioner's opportunity to earn good behavior and participation credits is unchanged. All that has changed are the

sanctions for prison misconduct. Unlike Weaver, petitioner's effective sentence is not altered by the 1982 amendments unless petitioner, by his own action, chooses to alter his sentence. We cannot conclude that sanctions for future prison misconduct that might occur were "one determinant" of petitioner's initial sentence.

Even if we were to accept petitioner's argument that the 1982 amendments relate to his initial offense, we would still hold that the ex post facto clauses are not violated. Although Weaver held that the ex post facto clauses apply to "punitive conditions outside the sentence" (Weaver, supra, 450 U.S. at p. 32), they do

not apply to <u>any</u> change in prison conditions but only those changes that increase the punishment (<u>id</u>., at p. 29). We find that the 1982 amendments simply change one aspect of petitioner's life in prison. The 1982 amendments neither increase petitioner's maximum sentence nor reduce the good behavior credits he can earn. While the distinction between "punitive conditions" (which implicate the ex post facto clauses) and other prison conditions is often not salient, we believe that the 1982 amendments do not affect petitioner's punitive conditions. As an administrative matter, a prison may well be able to function under a plan in which

different classes of prisoners are entitled to different levels of rewards for good conduct. It is, however, something entirely different to have a prison population subject to different disciplinary rules and penalties for violations in prison. From the standpoint of prison order, it is simply infeasible to run a prison in which some inmates are wholly or partially immune from punishment for conduct for which others receive serious penalties.7/

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7. Thus, for example, if the new disciplinary proscriptions may constitutionally apply only to new prisoners, petitioner's cellmate--if recently admitted--might lose time credit for stealing property of another inmate (Pen. Code, §484 et seq.) or for selling a substance which he falsely represented was heroin (see Health and Saf. Code, §11382), while petitioner could be subjected to no loss of credit for the

No authority compels us to extend Weaver to the future-prison-misconduct context. The only case cited as being in point is Greenfield v. Scafati (D. Mass. 1967) 277 F.Supp. 644, affd. per curiam (1968) 390 U.S. 713. There a three-judge district court enjoined the operation of a Massachusetts statute (1965 Mass. Acts, ch. 884) as far as persons sentenced for crimes committed before its effective date were concerned. In brief, the statute deprived prisoners returned to prison for parole violations of the automatic credit for presumed good behavior during the first six months after return to custody.

The three-judge court held that the statute disadvantaged persons who had committed crimes before its effective date by converting an "unqualified parole" into a parole "cum onere, i.e. subject to ch. 884." In other words, before the passage of the statute, a parolee who violated his parole faced revocation but, once back in prison, was on a par with other inmates as far as credits for the next six months were concerned. The statute, however, created an additional penalty for a parole violation. For two reasons we do not consider Greenfield controlling here: (1) the focus of Greenfield was not on the effect on prison administration of a holding that

the statute was invalid, but on conduct inside the prison walls; (2) invalidating the statute as to certain prisoners did not have the effect of immunizing their future conduct from sanctions for prison rule violations. As far as one can tell, they remained subject to loss of credits for "misbehavior."

In Weaver, the United States Supreme Court stated that, "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." (Weaver, supra, 450 U.S. at p. 32.) Nonetheless, we reject the notion that the sanctions for possible

future prison misconduct constitute a "significant factor" for either the trial judge or defendant. We conclude that the frequency and seriousness of a defendant's future prison misconduct is too contingent and remote to influence significantly either defendants or trial courts before plea and sentencing. (See id., at p. 32.)

We thus determine that the 1982 amendments are not retrospective and therefore do not violate the ex post facto clauses. Our holding is bolstered by the policy behind the ex post facto clauses that criminal laws must give fair warning to those who may fall within their ambit. (Weaver, supra, 450 U.S. at p. 28.) Here, of course,

petitioner had fair warning that if he committed certain offenses after January 1, 1983, he would be subject to increased sanctions.

To the extent In re Paez, supra, 148 Cal.App.3d 919, is in conflict with this opinion, that case is disapproved.

The writ of habeas corpus is denied.

LUCAS, J.

WE CONCUR:

MOSK, J.
BROUSSARD, J.
KAUS, J.
GRODIN, J.

IN RE RAMIREZ ON HABEAS CORPUS

Crim. 23684

DISSENTING OPINION BY REYNOSO, J.

I dissent. In dealing with the issue of retrospectivity, the United States Supreme Court in Weaver v. Graham, 450 U.S. 24 at page 31, stated: "The critical question if whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, the question can be recast as asking whether [the state statute] applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative." I find this holding squarely on point and controlling.

The majority seeks to distinguish Weaver on two grounds. First, it concludes that the 1982 amendments are not retrospective because they apply only to events occurring after their enactment. The majority contends that any increased sanctions in the 1982 amendments relate to a subsequent prison infraction, not to the original offense. Second, the majority seems to hold that the ex post facto clauses do not apply because the 1982 amendments do not increase the petitioner's maximum sentence nor reduce good behavior credits.

The majority is wrong on both counts.

First, the majority fails to

acknowledge that sanctions are also one determinant of petitioner's total prison term. Once this determinant is changed, petitioner's effective sentence is altered. That is what Weaver v. Graham is all about. (Weaver, 450 U.S. at p. 32.) The incorrectness of that majority's line of analysis is demonstrated by the contrary and correct analysis of Greenfield v. Scafati (D. Mass. 1967) 277 F.Supp. 644, summarily affirmed (1968) 390 U.S. 713. cited with approval in Weaver.

In Greenfield, the state legislature amended a statute regulating "good conduct" deductions from sentences, making violation of parole grounds for

forfeiture of good conduct deductions. It also decided to apply the amended statute to persons, such as the petitioner, who were already under sentence.

In that case, the petitioner acted in violation of his parole <u>after</u> the statute was amended. Accordingly, the amended statute would not have altered the petitioner's effective sentence unless petitioner, by his own actions, chose to alter his sentence by violating parole. The petitioner also had fair warning that if he committed certain parole violations, he would be subject to increased sanctions. Despite these factors, the court concluded that application of the amended statute

to the petitioner was unconstitutional as an ex post facto law. It reasoned that the difference between mere termination of parole under the former statute and an increased punishment under the new statute was substantial. "To effect this by legislation enacted after the offense for which sentence was imposed cannot be constitutionally supported." (Greenfield, 277 F.Supp. at p. 646.) 1/

Similarly, our focus should be on the petitioner's offense in this case. The state is not punishing

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1. See also Beebe v. Phelps (5th Cir. 1981) 650 F.2d 774, 776 (revised statute that revoked accrued "good time" for violation of parole held unconstitutional as applied to petitioner who was originally sentenced before enactment of statute.)

petitioner for a new crime by proceeding to trial on the charge of altering paperwork relating to a television. Instead, the state is increasing the punishment for an offense committed before the additional sanctions were enacted. As we stated previously, "[t]he tenor of Weaver seems unmistakable: prejudicial changes in punishment enacted after commission of a crime are suspect on ex post facto grounds." (In re Stanworth (1982) 33 Cal.3d 176, 181.)

Second, the majority finds that the 1982 amendments' increased sanctions do not constitute "punitive conditions outside the sentence." (Weaver, 450 U.S. at p. 32.) The Supreme Court in Weaver

found that a reduction in a gain-time provision changed that quantum of punishment. (Id., at p. 33.) It is difficult to understand why increasing sanctions for prison misconduct would not also be regarded as a punitive condition.

To bolster its position, the majority raises the paper tiger of prison administration, claiming that inconsistent disciplinary rules for prison infractions would result in immunity from punishment for some prisoners. Not true! Nothing prevents prison authorities from enforcing a uniform disciplinary standard by resort to criminal prosecution of all inmates convicted for acts committed before January 1, 1983, for any criminal

act they commit while in prison.

In summary, it seems clear that the 1982 amendments are retrospective when applied to an offender such as petitioner who was convicted before the amendments' effective date.2/ Since the amendments disadvantage the petitioner, I would hold them unconstitutional as an ex post facto law.

REYNOSO, J.

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2. See, e.g., Knuck v. Wainwright (11th Cir. 1985) 759 F.2d 856, 859 (change in administrative construction of gain-time statute was retrospective as applied to petitioner whose offense occurred four years before the change in interpretation); Burnside v. White (8th Cir. 1985) 760 F.2d 217, 220 (amended parole statute was retrospective as applied to petitioner convicted for acts committed before the statute's effective date).

I CONCUR:

BIRD, C.J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re	)
	)
RUDY J. RAMIREZ	)
	)
On Habeas Corpus.	)
	)

Rudy J. Ramirez, (petitioner), seeks to review by way of writ of habeas corpus, the loss of good time credits which were ordered forfeited under a statutory provision not in effect at the time he was convicted.

Penal Code sections 2932-2935, effective January 1, 1983, substantially revise the scheme under which inmates can earn and forfeit conduct credits. The new

statutory scheme gives prisoners a chance to substantially reduce their time. They may choose to participate in a credit qualifying program which gives them the opportunity to earn more conduct credit than they could have earned under the former statute. Under the new statutes, however, more conduct credits may be forfeited even if a prisoner elects not to participate in the new program. Petitioner maintains that the application of the statute to him violates the ex post facto clauses of both the federal Constitution (Art. I, §10, cl. 1) and the California Constitution (Art. I, §9). We disagree.

Prior to January 1, 1983,

petitioner was convicted of a felony and was committed to the San Luis Obispo Men's Colony. In January of 1983, the Department of Corrections charged petitioner with a disciplinary rule violation for falsification of records (altering the paperwork relating to a television set purchased by petitioner). On January 31, 1983, a hearing officer assessed petitioner with a loss of 95 days of behavior credits. Petitioner filed an administrative appeal on February 2, 1983. He alleged that the loss of behavior credits, based upon legislation effective January 1, 1983, was invalid. Petitioner's appeal resulted in a reduction of credit loss to 48 days. Petitioner

took no further administrative appeal.

On May 27, 1983, he sought relief by way of a petition for habeas corpus in the superior court. Petitioner claimed that the loss of conduct credits based upon the amended version of Penal Code section 2932, subdivision (a) violated the ex post facto clause. He asserted that under the pre-1983 version of section 2932(a) his actions would have given rise to a maximumloss of 15 days of conduct credit.

Petitioner's application for a writ of habeas corpus in the superior court was denied on the ground that he had failed to exhaust his administrative

remedies. (In re Muszalski (1975) 52 Cal.App.3d 475, 478-479.) Petitioner's request for relief from this court was denied on the same ground. He then petitioned the state Supreme Court to consider the constitutionality of Penal Code section 2932 subdivision (a) in light of Weaver v. Graham (1981) 450 U.S. 24.

In Weaver v. Graham, supra, the United States Supreme Court struck down, as ex post facto, Florida's good-time statute. The Florida law reduced the amount of credit available for good conduct behavior of prisoners whose crimes were committed prior to the statute's enactment. While Florida's law lengthened the prison term by

decreasing the opportunity to earn good time credit, California's new law makes possible a longer term of incarceration by increasing the amount of conduct credit subject to forfeiture.

Petitioner has directed our attention to In re Paez (1983) 148 Cal.App.3d 919 (hg. den.), a published case recently decided by Division Four of the First District Court of Appeal. Paez held that the application of the amended version of Penal Code section 2932 to a prisoner sent to state prison for an offense committed prior to January 1, 1983, constitutes a violation of the prohibition against ex post facto laws.

We disagree with Paez...although

notwithout trepidation. We proceed gingerly because we are aware of the following:

1. The state Supreme Court remanded this case to us for a decision on the constitutionality of Penal Code section 2932(a) in light of Weaver v. Graham;

2. Paez based its decision on Weaver v. Graham;

3. The facts in this case are uncomfortably similar to those in Paez;

4. The Supreme Court denied a hearing in Paez. 1/

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1. We also have in mind Justice Kaus' paper, "Precedent Is A Many Splendored Thing, or Let Thirteen Flowers Bloom." He argues that divisions in the court of appeal should give deference to holdings of other divisions in the same or other districts to prevent the "balkanization" of the law.

Nevertheless, we feel our holding is not quixotic because the signs may not be as foreboding as they appear. The Supreme Court's refusal to grant a hearing in a particular case is not its definitive pronouncement of the law stated in that particular case. See People v. Triggs (1973) 8 Cal.3d 884, 890-891.

In Weaver v. Graham, supra, 450 U.S. 24, a Florida statute governing conduct credit, repealed an earlier conduct credit statute and reduced the amount of "gain time" that a prisoner could earn for good conduct under the earlier statute. The confinement time of the prisoner, who was sentenced prior to the enactment of the new

statute, was increased, irrespective of his conduct.

The United States Supreme Court concluded that the statute was unconstitutional as an ex post facto law. It pointed out that "[t]he ex post facto prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' §Citations omitted.]" Weaver v. Graham, supra, 450 U.S. 24, 28. It found the Florida statute violated the ex post facto clause because it was both retrospective and more onerous than the law in effect on the date of

the offense.

The new statute at issue here, Penal Code section 2932(a), may either increase or decrese a prisoner's confinement time in comparison with the earlier statute. A prisoner only loses conduct credit for violations occurring after the date of the new statute. This statute may make it possible for the offender to be disadvantaged, but only if he commits an act which violates prison rules. The statute does not punish beyond what was prescribed when the crime was consummated in the same way as the statute reviewed in Weaver v. Graham. Here, petitioner's choices determine his destiny. He is

master of his own ship, and by virtue of the statute, he has the opportunity to reduce his confinement time. The statute is not retrospective because it gives him fair notice of what future conduct will adversely affect his behavioral credits. In Weaver, the statute was retrospective, because no matter what Weaver did, it made his term longer. Here, only future conduct, which petitioner has the power to control, may result in a longer sentence than he would have served under the earlier statute.

Despite this significant difference, Paez states that the ex post facto argument still applies to the California statute because "[e]ven though forfeiture involves

misconduct after conviction, it also is a 'legal consequence' which 'attaches' to the crime for which the prisoner is incarcerated for it changes the amount of time the prisoner must serve for that crime before being released." (In re Paez, supra, 148 Cal.App.3d 919, 922.)

Paez thus holds that when a prisoner has committed his original offense, he in effect buys a punishment package. This package includes Department of Corrections regulations concerning conduct credit in effect at that time. Paez holds that these regulations can not be changed for prisoners convicted before January 1, 1983, because to do so would violate the

ex post facto clause. This ignores the power of such prisoners to regulate their own conduct so as to control the early opening or the prolonged closing of the prison door. The mere fact that the new statute may increase confinement time beyond what was prescribed when they first committed their offenses, does not violate the ex post facto clause.

In Warren v. United States Parole COmmission 659 F.2d 183 (D.C. Cir. 1981), cert. den. 445 U.S. 950 (1982), after the time of offense and sentencing of petitioner, the Parole Board for the first time adopted guidelines to determine eligibility for reparole. Even though these guidelines were

adopted after he committed his first crime, but before he was released on parole, they were found not to violate the ex post facto clause. The court pointed out that "...Warren [petitioner] was provided fair notice on which he could rely regarding the consequences of prohibited conduct while he was released on parole. And finally, assuming hypothetically that the guidelines do in fact add to an inmate's punishment for crimes committed on parole, the imposition of the guidelines serves the core purpose of the criminal law, special deterrence of future crime, There is thus no danger that the guidelines could be used

inappropriately to invoke the drastic stigma and focused penalties of the criminal law in circumstances in which the central aim of the criminal law could not possibly be achieved. In sum, as applied to Warren and others like him the guidelines do not offend the polciies behind the ex post facto clauses." Warren v. united States Parole Commission, supra, 659 F.2d 183, 194.

Warren referred to Gryger v. Burke (1948) 334 U.S. 728 in its focus on the prospective nature of the reparole guidelines. In Gryger a recidivist statute that increased penalties for subsequent convictions for the same offense, was held to validly apply to a

defendant whose first offense occurred before the statute was passed. The statute, like the reparole guidelines in Warren did not run "afoul of the aims of the ex post facto clause because the operation of each can be triggered only by future crimes. To put this in other words, in Warren's case the reparole guidelines would not have affected him but for his subsequent criminal convictions. [Fn. omitted.] Gryger thus appears to dispose of Warren's case on the basis that the guidelines--if they punish at all--punish acts committed after they were promulgated." Warren v. United States Parole Commission, supra, 659 F.2d 183, 194-195. So here

too, the new California statute only prohibits future conduct. The Warren rationale is even more compelling when applied to rules governing prisoner conduct.

The People make a cogent point when they argue that logic defies findings an ex post facto violation in this case. It would create the anomaly of two inmates who commit the same disciplinary violation suffering different losses of credits merely because they committed their crimes on different dates. The inmate who lost the most credits would probably not be placated by an exegesis on the application of ex post facto principles to the disparity in punishment. Further, it would

exacerbate conditions in the prison population that might lead to unrest and disorder, and the consequent jeopardy to inmate's safety.

"[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. [Fn. omitted.]

'[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.'" (Bell v. Wolfish (1979) 441 U.S. 520, 546-547 citing Pell v. Procunier (1974) 14 U.S.

817, 823.) The court in Bell further pointed out that ",,,the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. [Citations omitted]" (Id., at p. 547.)

Paez freezes the rules and regulations of the Department of Corrections at a particular point in time so that prison officials are deprived of the flexibility to

respond to changing conditions by adopting reasonable rules and regulations to control the prison population. Like Holden Caulfield in Salinger's Catcher in the Rye, who wondered where the ducks go when the lake freezes over, so prison officials might wonder how they can effectively respond to changing circumstances in the prison population when outdated rules and regulations are frozen in time.

Penal Code section 2932(a) does not violate ex post facto principles because it does not impose a punishment for an act which was not punishable at the time that act was committed. Paez distorts the meaning of ex post

facto. Such a mutation should not have the chance to spread.

Accordingly, the writ is denied.

CERTIFIED FOR PUBLICATION

GILBERT, J.

We concur:

STONE, P.J.

ABBE, J.

February 10, 1984

Honorable Steven J. Stone,
Presiding Justice
California Court of Appeal
Second Appellate District
Division Six
1280 South Victoria Ave.
Suite 201
Ventura, California 93003

Dear Justice Stone:

In re Rudy Ramirez
2 Crim. 44865
Our file No. LA83SH0098

This is to inform you that the case of In re Paez, 148 Cal.App.3d 919, cited by respondent and amicus, is final. The Attorney General's petition for hearing in the state supreme court was denied. Further review in the United States Supreme Court is being considered.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General

SAH:rbs

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re	) 2d Criminal No. 44865
	)
RUDY J. RAMIREZ	) ORDER
	)
On Habeas Corpus	) S.C. No. H.C. 1706
	) San Luis Obispo County
	)

THE COURT:

The petition for writ of habeas corpus filed July 12, 1983, has been read and considered.

The petition is denied. (In re Muszalski (1975) 52 Cal.App.3d 500, 507-508.)

IN THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF

SAN LUIS OBISPO

In the Matter of the Application of	)	No. HC 1706
RUDY J. RAMIREZ	)	ORDER DENYING PETITION
For Writ of Habeas Corpus	)	

Petition for Writ of Habeas Corpus filed May 27, 1983. the petition is denied. Petitioner is required to exhaust administrative remedies before seeking relief in the courts. (In re Muszalski (1975) 52 Cal.App.3d 500).

Dated: Jun 14 1983

HARRY E. WOOLPERT
Judge of the Superior Court

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

REMITTITUR

CRIM. No. 23684

In re	)	
	)	Appeal
RUDY J. RAMIREZ	)	County San Luis Obispo
	)	
	)	Superior Court No.
	)	

The above-entitled cause having been heretofore fully argued, and submitted, It Is Ordered, Adjudged, and Decreed by the Court: Writ of Habeas Corpus is denied.

Order Due
October 26, 1985

ORDER DENYING REHEARING

CRIM. No. 23684

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

IN RE RUDY RAMIREZ

ON HABEAS CORPUS

Petitioner's petition for rehearing

DENIED.

The application to stay issuance of the remittitur is denied.

Chief Justice

United States Constitution, Art. 1, section 10, clause 1:

No State shall...pass any...ex post facto Law.

California Penal Code sections 2930-35 (effective Jan. 1, 1983) [pertinent portions]:

§2931. §Reduction of sentence for good behavior: Conditions.] (a) In any case in which a prisoner was sentenced to the state prison pursuant to Section 1170, or if he committed a felony before July 1, 1977, and he would have been sentenced under Section 1170 if the felony had been committed after July 1, 1977, the Department of Corrections shall have the authority to reduce the term prescribed under such section by one-third for good behavior and participation consistent with subdivision (d) of Section 1170.2. A document shall be signed by a prison official and given to the prisoner, at the time of compliance with Section 2930, outlining the conditions which the prisoner shall meet to receive the credit. The conditions specified in such document may be modified upon any of the following:

(1) Mutual consent of the prisoner and the Department of Corrections.

(2) The transfer of the prisoner from one institution to another.

(3) The department's determination of the prisoner's lack of adaptability or

success in a specific program or assignment. In such case the prisoner shall be entitled to a hearing regarding the department's decision.

(4) A change in custodial status.

(b) Total possible good behavior and participation credit shall result in a four-month reduction for each eight months served in prison or in a reduction based on this ratio for any lesser period of time. Three months of this four-month reduction, or a reduction based on this ratio for any lesser period, shall be based upon forbearance from any act for which the prisoner could be prosecuted in a court of law, either as a misdemeanor or a felony, or any act of msconduct described as a serious disciplinary infraction by the Department of Corrections.

(c) One month of this four-month reduction, or a reduction based on this ratio for a lesser period, shall be based solely upon participation in work, educational, vocational, therapeutic or other prison activities. Failure to succeed after demonstrating a reasonable effort in the specified activity shall not result in loss of participation credit. Failure to participate in the specified activities can result in a maximum loss of credit of 30 days for each failure to participate. However, those confined for other than behavior problems shall be given specified activities commensurate with the custodial status.

(d) This section shall not apply to any person whose crime was committed on or after January 1, 1983.

§2932. [Denial of good behavior and participation credit.] (a) For any time credit accumulated pursuant to Section 2931 or to Section 2933, not more than 180 days of credit may be denied or lost for a single act of misconduct which could be prosecuted as a felony whether or not prosecution is undertaken, except that not more than one year of credit may be denied or lost for a single act of battery in which great bodily injury is inflicted upon a nonprisoner. Not more than 90 days of credit may be denied or lost for a single act of misconduct whcih could be prosecuted as a misdemeanor, whether or not prosectution is undertaken. Not more than 30 days of credit may be denied or lost for a single act of misconduct defined by regulation as a serious disciplinary offense by the Department of Corrections. Any person confined due to a change in custodial classification following the commission of any serious disciplinary infraction shall, in addition to any loss of time credits, be ineligible to receive participation or work-time credit for a period not to exceed the number of days of credit which have been lost for such act of misconduct. In unusual cases, an inmate may be denied the opportunity to participate in a credit qualifying assignment for up to six months beyond the period specified in this subdivision of the Director of Corrections finds, after a hearing, that no credit

qualifying program may be assigned to the inmate without creating a substantial risk of physical harm to staff of other inmates. At the end of the six-month period and of successive six-month periods, the denial of the opportunity to participate in a credit qualifying assignment may be renewed upon a hearing and finding by the director.

The prisoner may appeal the decision through the department's review procedure, which shall include a review by an individual independent of the institution who has supervisorial authority over the institution.

(b) For any credit accumulated pursuant to Section 2931, not more than 30 days of participation credit may be denied or lost for a single failure or refusal to participate. ANy act of misconduct described by the Department of Corrections as a serious disciplinary infraction if committed while participating in work, educational, vocational, therapeutic or other prison activity shall be deemed a failure to participate.

§2933. [Worktime credit; Receipt; Forfeiture; Regulations] (a) It is the intent of the Legislature that persons convicted of crime and sentenced to state prison, under Section 1170, serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Director of Corrections for performance in work, training or education programs

established by the Director of Corrections. Worktime credits shall apply for performance in work assignments and performance in elementary or high school, or vocational education programs. Enrollment in a two- or four-year college program leading to a degree shall result in the application of time credits equal to that provided in Section 2931. For every six months of full-time performance in a credit qualifying program, as designated by the director, a prisoner shall be awarded worktime credit reductions from his term of confinement of six months. A lesser amount of credit based on this ratio shall be awarded for any lesser period of continuous performance. Less than maximum credit should be awarded pursuant to regulations adopted by the director for prisoners not assigned to a full-time credit qualifying program. Every prisoner who refuses to accept a full-time credit qualifying assignment or who is denied the opportunity to earn work-time credits pursuant to subdivision (a) of Section 2932 shall be awarded no worktime credit reduction. Every prisoner who voluntarily accepts a half-time credit qualifying assignment in lieu of a full-time assignment shall be awarded worktime credit reductions form his term of confinement of three months for each six-month period of continued performance. Except as provided in subdivision (a) of Section 2932, every prisoner willing to participate in a full-time credit qualifying assignment but who is either not assigned to a full-time assignment

or is assigned to a program for less than full time, shall receive no less credit than is provided under Section 2931. Under no circumstances shall any prisoner receive more than six months' credit reduction for any six-month period under this section.

(b) Worktime credit is a privilege, not a right. Worktime credit must be earned and may be forfeited pursuant to the provisions of Section 2932. Except as provided in subdivision (a) of Section 2932, every prisoner shall have a reasonable opportunity to participate in a full-time credit qualifying assignment in a manner consistent with institutional security and available resources.

(c) Under regulations adopted by the Department of Corrections, which shall require a period of not more than one year free of disciplinary infractions, worktime credit which has been previously forfeited may be restored by the director. The regulations shall provide for separate classifications of serious disciplinary infractions as they relate to restoration of credits; the time period required before forfeited credits or a portion thereof may be restored; and the percentage of forfeited credits that may be restored for such time periods. No credits may be restored if they were forfeited for a serious disciplinary infraction in which the victim died or was permanently disabled. Upon application of the prisoner and following completion of the required time period free of disciplinary offenses, forfeited

credits eligible for restoration under the regulations shall be restored unless, at a hearing it is found that the prisoner refused to accept of failed to perform in a credit qualifying assig or extraordinary circumstances are present that require that credits not be restored. "Extraordinary circumstances" shall be defined in the regulations adopted by the director.

The prisoner may appeal the finding through the Department of Corrections review procedure, which shall include a review by an individual independent of the institution who has supervisorial authority over the institution.

(d) The provisions of subdivision (c) shall also apply in cases of credit forfeited under Section 2931 for offenses and serious disciplinary infractions occurring on or after January 1, 1983. [1982 ch 1234 §4.]

§2934. [Waiver of right to receive good behavior and participation credits] Under rules prescribed by the Director of Corrections, a prisoner subject to the provisions of Section 2931 may waive the right to receive time credits as provided in Section 2931 and be subject to the provisions of Section 2933. In order to exercise a waiver under this section, a prisoner must apply in writing to the Department of Corrections. A prisoner exercising a waiver under this section shall retain only that portion of good behavior and participation credits, which have not been forfeited pursuant to Section 2932,

attributable to the portion of the sentence served by the prisoner prior to the effective date of the waiver. A waiver under this section shall, if accepted by the department, become effective at a time to be determined by the Director of the Department of Corrections. [1982 ch 1234 §5.]

§2935. [Grant of additional reduction of senence] Under the guidelines prescribed by the rules and regulations of the director, the Director of Corrections may grant up to 12 additional months of reduction of the sentence to a prisoner who has performed a heroic act in a life-threatening situation, or who has provided exceptional assistance in maintaining the safety and security of a prison. [1982 ch 1234 §6.]

(Former) California Penal Code sections 2931-32

§22931. Reduction of term for good behavior and participation; document outlining conditions; modifications

(a) In any case in which an inmate was sentenced to the state prison pursuant to Section 1170, or if he committed a felony before July 1, 1977, and he would have been sentenced under Section 1170 if the felony had been committed after July 1, 1977, the Department of Corrections shall have the authority to reduce the term prescribed under such section by one-third for good behavior and participation consistent with subdivision (d) of Section 1170.2. A document shall be signed by a prison official and given to the inmate, at the time of compliance with Section 2930, outlining the conditions which the inmate shall meet to receive the credit. The conditions specified in such document may be modified upon any of the following:

(1) Mutual consent of the prisoner and the Department of Corrections.

(2) The transfer of the inmate from one institution to another.

(3) The department's determination of the prisoner's lack of adaptability or success in a specific program or assignment. In such case the inmate shall be entitled to a hearing

regarding the department's decision.

(4) A change in custodial status.

(b) Total possible good behavior and participation credit shall result in a four-month reduction for each eight months served in prison or in a reduction based on this ratio for any lesser period of time. Three months of this four-month reduction, or a reduction based on this ratio for any lesser period, shall be based upon forbearance from any or all of the following activities:

(1) Assault with a weapon; or escape.

(2) Physically assaultive behavior; possession of a weapon without permission; possession of controlled substances without prescription; attempt to escape; or urging others by words or acts, with the intent to cause a riot, to commit acts of force or violence, at a time and place under circumstances which produce a clear and present and immediate danger of a riot which results in acts of force or violence; or active participation in a riot that results in acts of force or violence.

(3) Intentional destruction of state property valued in excess of fifty dollars ($50); falsification of a significant record or document; possession of escape tools without permission; or manufacture, sale or unauthorized possession or use of alcoholic beverages or any substance

defined as a poison in Schedule D of Section 4160 of the Business and Professions Code; or urging of others by words or acts, with the intent to cause a riot, to commit acts of force or violence at a time and place under circumstances which present a clear and present and immediate danger of a riot, or committing any act, with the intent to precipitate a riot, at a time and place under circumstances which present a clear and present and immediate danger of a riot. Activities specified in paragraph (1) may result in a maximum denial of good behavior credit of 45 days for each such prohibited activity. Activities specified in paragraph (2) may result in a maximum denial of good behavior credit of 30 days for each such prohibited activity. Activities specified in paragraph (3) may result in a maximum denial of good behavior credit of 15 days for each such prohibited activity. Nothing in this section shall prevent the Department of Corrections from seeking criminal prosecution for violations of law.

(c) One month of this four-month reduction, or a reduction based on this ratio for a lesser period, shall be based solely upon participation in work, educational, vocational, therapeutic or other prison activities. Failure to succeed after demonstrating a reasonable effort in the specified activity shall not result in loss of participation credit. Failure to participate in the specified activities can result in a maximum loss of credit of 30 days for each failure to participate. However,

those confined either by choice or due to behavior problems shall be given specified activities commensurate with the custodial status.

§2932. [Denial of good behavior and participation credit]

(a) Not more than 90 days of good behavior credit nor more than 30 days of participation credit may be denied or lost during any eight-month period during which the misbehavior or failure to participate took place. Good behavior and participation credit shall be deemed to be earned in cases where the department fails to adhere to the time limitations of this section except as specified in subdivision (c). Any procedure not provided for by this section, but necessary to carry out the purposes of this section, shall be those procedures provided for by the Department of Corrections for serious disciplinary infractions if those procedures are not in conflict with this section.

Title 15, Calif. Admin. Code, section 3315 (subd. a-d):

3315. Serious Rule Violations.

(a) Inmate misbehavior shall be classified as a SERIOUS rule violation if the act or action of the inmate is an act of force or violence against another person, a breach of or presenting a threat to institution security, a serious disruption of institution operations, the introduction or use of dangerous contraband or controlled substances or is an attempt to commit any such act coupled with a present ability to carry out the threat or attempt if not prevented from doing so. SERIOUS rule violations include but are not limited to:

(1) Any act for which the inmate could be prosecuted for a felony, whether or not prosecution is undertaken.

(2) Any act for which the inmate could be prosecuted for a misdemeanor whether or not prosecution is undertaken.

(3) Any act of misconduct which is reportable to any parole board or releasing authority.

(4) Intentional destruction of state property valued at $50 or more, or intentional damage to state property requiring more than $50 to repair or replace.

(5) Hideout or preparation to escape.

(6) Possession of escape paraphernalia.

(7) Possession of money in an amount of five dollars or more without proper authorization.

(8) Acts of disobedience or disrespect which by reason of intensity or context create a potential for violence or mass disruptive behavior.

(9) Willfully inciting or attempting to incite other persons to commit an unlawful act of force or violence.

(10) Refusal or failure to perform work or participate in programs as ordered or assigned.

(11) Participation in a strike or work stoppage.

(12) A pattern of Administrative rule violations indicating significant maladjustment, which are of increasing seriousness or are of special significance in light of an existing release date.

(13) Mail or visiting violations that create a threat to the safety of any individual or to institutional security, including the introduction of dangerous contraband or a controlled substance, or the obtaining or attempt to obtain a family visit by falsification of information.

(14) The throwing of any liquid or solid substance on a non-prisoner.

(15) Unauthorized possession of official departmental records or documents which could affect any prisoner's sentence.

(16) Refusal to submit to a test for controlled substance.

(17) Late return or failure to return from authorized temporary release.

(18) Involvement in a conspiracy to do any or all of the above.

CLERK'S OFFICE, SUPREME COURT
4250 State Building
SAN FRANCISCO, CALIFORNIA 94102

FEB 14 1985

I have this day filed Order

HEARING GRANTED

In re: 1 Crim No. A027744
MAURICE LeDAY
On Habeas Corpus

Respectfully,

Clerk

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re

MAURICE LeDAY, A027744

On Habeas Corpus.

_____/

As applied to a parolee whoe initial imprisonment was based on a crime committed before the effective date of subdivision (c) of Penal Code section 3057 (which authorizes extensions of parole viclators' recommitment terms for new misconduct), is subdivision (c) an unconstitutional ex post facto provision? We conclude that it is.

Until January 1, 1984, subdivision (a) of section 3057 provided without additional qualification that "[c]onfinement

pursuant to a revocation of parole in the absence of a new conviction and commitment to prison under other provisions of law, shall not exceed twelve months." Effective on that date subdivision (c) was added to section 3057, and subdivision (a) was amended to add the words "except as provided in subdivision (c)." (Stats. 1983, ch. 757, §2.) Subdivision (c) provides, in pertinent part: "Notwithstanding the limitation of subdivision (a) upon confinement pursuant to parole revocation for a maximum of an additional 12 months for subsequent acts of misconduct committed by the parolee while confined pursuant to that parole revocation."

Maurice LeDay was sentenced to prison in October 1981, released on

parole in April 1983, and recommitted to prison in July 1983 for parole violation with a release date of June 17, 1984. In April 1984 LeDay's release date was postponed to August 1984 upon a finding that he had committed an act of misconduct in February 1984. He filed a petition for habeas corpus in the Supreme Court, contending that as applied to him subdivision (c) is an unconstsitutional ex post facto law. The Supreme Court issued an order to show cause returnable here. LeDay was released from prison in July, while this petition was pending. Because we regard the ex post facto issue as one of broad public interest that is likely to recur in other contexts, we proceed to the merits notwithstanding the apparent mootness of LeDay's

application. (In re William M. (1970) 3 Cal.3d. 16, 23-25.)

"The ex post facto prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' [Citations.] Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. [Citations.] The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation. [Citations.] [ ] In accord with these purposes, our decisions prescribe that two critical

elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. [Citations.]"
(Weaver v. Graham (1980) 450 U.S. 24, 28-29, fns. omitted.)

LeDay asserts that both elements are present here.

Unquestionably the new provisions embodied in subdivision (c), permitting extension of an parolee's recommitment term for misconduct committed during that term, disadvantaged LeDay in the requisite sense.

The closer question is whether, as aplied to LeDay, subdivision (c) was retrospective. The misconduct for

which LeDay's term was extended occurred after the effective date of the new subdivision. The People argue that the fair-warning purpose of the ex post facto clauses was served in LeDay's case: "Petitoner had fair notice as of [January 1, 1984] that future acts of misconduct could result in an extension of his terms of confinement for his parole violations. ... [P]etitioner, not the Legslature or the Board, was the master of his own destiny." LeDay argues that the relevant inquiry is whether (in the words of the U.S. Supreme Court) "the provision attaches legal consequences to a crime committed before the law took effect" (Weaver v. Graham, supra, 450 U.S. at p. 31) and that for this purpose the "crime" is not his new misconduct but

rather the crime for which he was initially committed to prison, long before January 1, 1984.

We agree with LeDay. The provisions of section 3057, regulating the length of time for which a parolee may be recommitted for violation of his parole, patently define "a 'legal consequence' which 'attaches' to the crime for which the prisoner is incarcerated...." (In re Paez (1983) 148 Cal.App.3d 919, 922; cf. Greenfield v. Scafati (D. Mass. 1967) 277 F.Supp. 644, 645-646, summarily aff'd, (1968) 390 U.S. 713, cited with approval in Weaver v. Graham, supra, 450 U.S. at p. 32.) Neither the fact that subdivision (c) "alters punitive

conditions outside the sentence" (Weaver v. Graham, at p. 32) nor the fact that its application in LeDay's case was triggered by misconduct which occurred after its effetive date (In re Paez, supra, at pp. 922-924) is relevant to the ex post facto inquiry in these circumstances.

In the circumstances of record LeDay was entitled to be released from prison on parole on June 17, 1984. The time he spent in prison after that date, upon purported extension of his recommitment term, may not be applied to increase his period of parole.

HANING, J.

we concur:

LOW, P.J.

KING, J.

Sections to inform their users that the penalty limit has been increased for battery upon a non-inmate, pursuant to this bulletin.

Please see that all staff who need to know are informed of the contents of this bulletin.

Mr. Robert Denninger, Assistant Deputy Director, Institutions Division, is the contact person for any inquiries regarding the contents of this bulletin. His telephone number is (916) 323-4296, or ATSS 473-4296.

This bulletin shall remain in effect until cancelled by a Director's Rule Revision Bulletin amending Director's Rule 3323(c).

JAMES H. GOMEZ
Chief Deputy Director

(2)

No. 85-1321

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

RUDY J. RAMIREZ,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP, Attorney General
of the State of California
MARK ALAN HART,
Supervising Deputy Attorney General
SHARLENE A. HONNAKA, Counsel of Record,
Deputy Attorney General

3580 Wilshire Blvd., Ste. 800
Los Angeles, CA 90010
Telephone: (213) 736-3000

Attorneys for Respondent

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SUMMARY OF ARGUMENT

The California law in issue is not retrospective because it applies only to conduct occurring after its enactment. The analysis employed by the California Supreme Court in finding no ex post facto law is consistent with this Court's previous decisions on the subject.

ARGUMENT

THE CALIFORNIA SUPREME COURT OPINION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT

The California Supreme Court in this case found no unconstitutional ex post facto law where a statute increasing credit forfeiture for prison misconduct was applied to a prisoner who committed his misconduct after the statute became effective. Petitioner claimed a violation of ex post facto principles because when he committed the underlying crime and was sentenced, less credits could be forfeited for the same prison misconduct. He argued that he served a longer sentence when more credits were forfeited under the new statute. (In re Ramirez (1983) 39 Cal. 3d. 981.)

The California Supreme Court's opinion correctly analyzed the ex post

facto claim and is entirely consistent with prior decisions of this Court. This Court has not expressly decided whether a new law regulating future prison conduct violates ex post facto principles because it may incidentally increase a previously incarcerated prisoner's minimum release date. However, it is clear from prior decisions that this Court would unequivocally reach the same conclusion as the California Supreme Court that such a new law is not ex post facto law.

In Weaver v. Graham (1981) 450 U.S. 24, this Court noted at p. 30 that "[c]ritical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond

what was prescribed when the crime was consummated."

Obviously, when a new law is passed which increases credit forfeiture for prison misconduct committed after its effective date, a prisoner is on notice that if he commits misconduct after the effective date, he will suffer more credit loss than before. Under the reasoning of Weaver, such a law is not ex post facto since there is fair notice and the new law has no direct application to the underlying sentence. This is exactly what the California Supreme Court concluded in this case, and what the Court of Appeals for the District of Columbia Circuit concluded in Warren v. United States Parole Commission (D.C. Cir. 1981) 659 F.2d 183, at pp. 194-195, cert. denied,

455 U.S. 950, in an anlogous factual situation.

This Court also stated in Weaver that to be ex post facto, a law must apply to events occurring before its enactment. (Weaver v. Graham, supra, at p. 29.) The new law involved in this case does not apply to events occurring prior to its enactment. It relates to future prison misconduct and future penalties for such future misconduct. Petitioner's automatically earned "gain time" remains unchanged, and his ability to continue earning at least the same amount of "gain time" remains unchanged. The maximum and minimum possible release dates remain unchanged and would even be sooner in some cases. These facts were noted by the California Supreme Court in support of its conclusion that the new law simply "does

not punish beyond what was prescribed when the crime was consummated . . . " (In re Ramirez, supra.)

In short, petitioner's punishment for his underlying crime remained exactly the same before and after the new law. The new law was entirely aimed at controlling future prison misconduct. It incidentally could affect the actual time served, but only by extending the minimum release date because of future credit forfeiture for future misconduct, and only if petitioner affirmatively engaged in prison misconduct after the effective date of the new law. The new law is so far from being an ex post facto law that in reality, there is simply no material ex post facto issue in this case for this Court to resolve.

Despite the clarity of this analysis, respondent recognizes that there appears to be some confusion among the circuits as to whether laws which increase the penalty for future misconduct and, thus, result in extending a prisoner's confinement period, are ex post facto laws. On the one hand, there is the persuasive analysis of the District of Columbia circuit as expressed in Warren v. United States Parole Commission, supra, finding no ex post facto violation. On the other hand, there is the cursory opinion of the Fifth Circuit in Beebe v. Phelps (5th Cir. 1981) 650 F.2d 774, finding to be ex post facto a new law which allowed forfeiture of 180 days of previously earned "good time" credits following a parole violation. In Beebe,

substantial reliance was placed upon Greenfield v. Scafati (D.Mass. 1967) 277 F.Supp. 644, a case summarily affirmed by this Court at 390 U.S. 713. In Greenfield, the district court found to be ex post facto a new law which disallowed conduct credits for a six-month period following reincarceration for parole violation.

Leaving aside the factual distinctions of Beebe and Greenfield, neither case specifically discussed whether the new law was retrospective, that is, directed at events occurring before its enactment, as required by Weaver v. Graham, supra, at p. 29. Instead, both cases assumed that fact, apparently because the new law incidentally affected the total length of

a prisoner's sentence by reducing credits following parole violation. However, the new laws in Beebe and Greenfield can be characterized as being directed at future events only, and not any past event. This is so because the penalty (loss of credits) attached only if the prisoner violated parole after the enactment of the new law. Thus, in both cases the prisoner had fair notice that if he violated parole after enactment of the new law, he would be subjected to a greater loss of credits. The new laws in Beebe and Greenfield were not retrospective because they were directed at future events (future good behavior by parolees), not past events. Had the courts in Beebe and Greenfield, examined the new laws to see if they were retrospective, clearly both would have

found no post facto law. (See Portley v. Grossman (1980) 444 U.S. 1311, 1312-1313, chambers opinion by Justice Rehnquist upon an application for a stay, which found no ex post facto violation in using new parole guidelines to set longer term of reincarceration following parole revocation: "The terms of the sentence have in no way been altered. Appellant cannot be held in confinement beyond the term imposed by the judge, and at the time of his sentence he knew that parole violation would put him at risk of serving the balance of his sentence in federal custody. The [guidelines], therefore, neither deprive applicant of any pre-existing right nor enhance the punishment imposed.")

The California statute in this case is not retrospective because it

relates only to prison misconduct occurring after its enactment. There is no significant ex post facto issue requiring this Court's resolution, and the petition for certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that the petition for certiorari be denied.

DATED: April 10, 1985.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California

MARK ALAN HART,
Supervising Deputy Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General
and Counsel of Record

3580 Wilshire Boulevard
Los Angeles, CA 90010
Telephone: (213) 736-3000

(3)

SUPREME COURT OF THE UNITED STATES

RUDY J. RAMIREZ *v.* CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 85-1321. Decided May 27, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE POWELL join, dissenting.

Petitioner Rudy Ramirez is currently serving a prison term imposed by the State of California for a crime committed before January 1, 1983. As of that date, a new plan for awarding sentence reduction credits and their forfeiture became effective. See Ca. Penal Code Ann. §§ 2931, 2932 (West Supp. 1986). Ramirez was charged in January 1983 with altering the paperwork relating to a television set. This resulted in a loss under the new plan of 95 days of behavior credits, which was later reduced to 48 days. Under the old plan, Ramirez would have forfeited at most 15 days.

Ramirez then filed a habeas corpus petition in the California state courts, challenging the application to him of the new system on the ground that such application violated the *ex post facto* clause of the United States Constitution. Art. I, § 10. A divided California Supreme Court upheld the new system, as applied to Ramirez, applying the two-part test set forth in *Weaver* v. *Graham*, 450 U. S. 24, 29 (1980), and concluding that the new provisions were not unconstitutionally retrospective because the increased sanctions were imposed only for misconduct occurring after the changes became effective. 39 Cal. 3d 931, —— Cal. Rptr. ——, —— P. 2d —— (1985).

The decision of the California Supreme Court conflicts with the decision of the United States Court of Appeals for the

2 pp

Fifth Circuit in *Beebe* v. *Phelps*, 650 F. 2d 774 (1981). In *Beebe*, the Fifth Circuit held that the application of new provisions for revoking previously earned credits for parole violations to a prisoner who had been incarcerated before the new provisions became effective violated the *ex post facto* Clause even where the parole violations occurred after the effective date of the new provisions. The decision of the California Supreme Court also is in tension with our decision in *Weaver*, *supra*, in which we held that the application to a prisoner of a new system for earning good-time credits, which system reduced the credits that could be earned, violated the *ex post facto* clause. See also *Greenfield* v. *Scafati*, 277 F. Supp. 644 (D. Mass. 1967), aff'd, 390 U. S. 713 (1968). In *Weaver*, we analyzed the question of retrospectivity according to whether the new rule "substantially alters the consequences attached to a crime already completed," 450 U. S., at 33, and the California Supreme Court's distinction here between the ability to earn good-time credits, at issue in *Weaver*, and the forfeiture of such credits, at issue here, does not seem immediately relevant to this analysis. To resolve the conflict with *Beebe* and the tension with *Greenfield* and *Weaver*, I would grant certiorari and set the case for argument.